Supreme Court, U.S.
FILED
SEP 22 1997
CLERK

No. 97-0133

In The

Supreme Court of the United States

October Term, 1996

DAVID CHARLES ZIMOMRA, On Behalf Of Himself And All Others Similarly Situated,

Petitioner,

vs.

ALAMO RENT-A-CAR, INC., AVIS, INC., BUDGET RENT A CAR CORPORATION, DOLLAR RENT-A-CAR SYSTEMS, INC., HERTZ CORPORATION, NATIONAL CAR RENTAL SYSTEM, INC., THRIFTY RENT-A-CAR SYSTEMS, INC., VALUE RENT-A-CAR, INC., ENTERPRISE LEASING CO. OF DENVER, NATIONAL CAR RENTAL, RESORT RENT-A-CAR, INC., STEAMBOAT SPRINGS RENTAL AND LEASING, INC., TRYND, INC., TIARA ENTERPRISES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

TERENCE C. GILL
Counsel of Record
STEPHEN D. GURR
BROWNSTEIN HYATT FARBER & STRICKLAND, P.C.
Attorneys for Respondent Hertz Corporation
410 Seventeenth Street
22nd Floor
Denver, CO 80202
(303) 534-6335

Additional Counsel Continued

72040 (800) 3 APPEAL • (300) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

32pp

DENNIS A. GRAHAM
CLANAHAN TANNER DOWNING
& KNOWLTON, P.C.
Attorneys for Respondent
Alamo Rent-A-Car Inc.
1600 Broadway St., Suite 2400
Denver, CO 80202
(303) 830-9111

ROLIN P. BISSELL
JEANNETTE M. BRIAN
SCHNADER, HARRISON, SEGAL & LEWIS LLP.
1600 Market Street, Suite 3600
Philadelphia, PA 19103-7286
(215) 751-2000

WILLIAM A. BIANCO
DALE R. HARRIS
DAVIS, GRAHAM & STUBBS, LLP
370 17th Street, Suite 4700
P.O. Box 185
Denver, CO 80201-0185
(303) 892-9400

Attorneys for Respondent Avis, Inc.

ROBERT YOULE
AMY BENSON
WILLIAMS, YOULE & KOENIGS, P.C.
Attorneys for Respondent
Budget Rent A Car Corporation
1200 17th Street, Suite 1420
Denver, CO 80202
(303) 572-6700

BENJAMIN S. SHARP
PERKINS COIE
607 14th Street, N.W., Suite 800
Washington, D.C. 20005-2011
(202) 628-6600

B. LAWRENCE THEIS
BOBBEE J. MUSGRAVE
PERKINS COIE
1675 Broadway, Suite 2800
Denver, CO 80202
(303) 571-6100

Attorneys for Respondent
Dollar Rent-A-Car Systems, Inc.

DAVID A. DONOHOE
SANFORD M. SAUNDERS, JR.
AKIN, GUMP, STRAUSS, HAUER
& FELD, L.L.P.
1333 New Hampshire Ave., N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4000

ROBERT F. HILL
KAREN A. TOMB
HILL & ROBBINS, P.C.
100 Blake Street Building
1441 Eighteenth Street
Denver, CO 80202
(303) 296-8100

Attorneys for Respondent
National Car Rental System, Inc.

TERRY CALVANI
PILLSBURY MADISON & SUTRO
1100 New York Avenue, N.W.
9th Floor, East Tower
Washington, D.C. 20005
(202) 861-3000

MARTIN BEIER
LONG, STEESE, DeGARLAIS
& BEIER, P.C.
1050 17th Street, Suite 2350
Denver, CO 80265
(303) 572-9300

Attorneys for Respondent
Thrifty Rent-A-Car System, Inc.

CRAIG R. CARVER
ALFERS & CARVER, LLC
Attorneys for Respondent
Value Rent-A-Car, Inc.
730 17th Street, Suite 340
Denver, CO 80202
(303) 592-7674

ROBERT MATTHEWS
CHRISMAN, BYNUM & JOHNSON
Attorneys for Respondent
Tiara Enterprises, Inc.
1900 15th Street
Boulder, CO 80302
(303) 546-1300

JOHN MADDEN, III
JOHN MADDEN, IV
MADDEN & MADDEN
410 17th Street, Suite 530
Denver, CO 80202
(303) 436-1111

ROMAN WULLER
THOMPSON COBURN
1 Mercantile Center
St. Louis, MO 63101
(314) 552-6000

Attorneys for Respondent
Enterprise Leasing Co.

KENTON H. KUHLMAN
KUHLMAN & KUHLMAN
Attorneys for Respondent
Steamboat Springs Leasing, Inc.
5290 DTC Parkway Suite 170
Englewood, CO 80111
(303) 770-6664

DAVID D. SCHLACHTER
TILLY & GRAVES
Attorneys for Respondent
Trynd, Inc.
3773 Cherry Creek North Drive
Denver, CO 80209
(303) 321-8811

JEFFREY J. COWMAN
SMITH McCULLOUGH, P.C.
Attorneys for Respondent
Resort Rent-A-Car, Inc.
4643 S. Ulster, Suite 900
Denver, CO 80237
(303) 221-6000

GREGORY B. KANAN
MICHAEL D. PLACHY
ROTHGERBER, APPEL, POWERS
& JOHNSON LLP
Attorneys for Respondent
National Car Rental, Inc.
1200 17th Street, Suite 3000
Denver, CO 80202
(303) 623-9000

QUESTIONS PRESENTED FOR REVIEW

1. Was the Tenth Circuit Court of Appeals correct in ruling that petitioner's antitrust claim, based solely on the requirement that he pay a uniform $2.98 "Usage Fee" as mandated by the City and County of Denver's Municipal Ordinance No. 863 (the "Bond Ordinance"), is barred by the state action immunity doctrine?

2. Was the Tenth Circuit Court of Appeals correct in ruling that the respondent car rental companies' alleged conduct of petitioning the City and County of Denver to establish and set the Usage Fee by enacting the Bond Ordinance is immune from antitrust liability under the *Noerr-Pennington* doctrine?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceedings.

Each respondent corporation lists its parent companies and non-wholly owned subsidiaries as follows:

Alamo Rent-A-Car, Inc.: None

Avis Inc.: HFS Incorporated; HFS Car Rental Holdings Inc.; HFS Car Rental Inc.; AESOP Leasing, L.P.; and AESOP Funding, II, LLC.

Budget Rent a Car Corporation: Budget Group, Inc.

Dollar Rent-A-Car Systems, Inc.: Dollar Rent A Car Systems, Inc., successor to Dollar Systems, Inc.; Pentastar Transportation Group, Inc.; Chrysler Corp.

Hertz Corporation: Ford Motor Company

National Car Rental System, Inc.: GM Holding Co.; General Motors Corporation

Thrifty Rent-A-Car: Chrysler Corporation; Pentastar Transportation Group, Inc.; Thrifty Rent-A-Car System, Inc.; Thrifty Car Rental Finance Corp.; Kam Cars of America, Inc.; Tartan, Inc.; TRAC Asia Pacific, Inc.; Wizer, Inc. of Phoenix; Thrifty Europe, S.A.; Thrifty Rent-A-Car Ltd. (U.K.); Thrifty Rent-A-Car Ltd. (Ireland); Thrifty Rent-A-Car Ltd. (New Zealand); Thrifty Rent-A-Car Ltd. (Scotland); Thrifty Canada, Ltd.; Kingmill Pty Limited; 840954 Ontario Ltd.

Value Rent-A-Car, Inc.: Mitsubishi Motor Sales of America, Inc.

Enterprise Leasing Co., of Denver: Enterprise Rent A Car Company

National Car Rental, Inc.: None

Resort Rent-A-Car, Inc.: None

Steamboat Springs Rental and Leasing, Inc. dba Advantage Rent-A-Car: Southwest-Tex Leasing Co., Inc.

Trynd, Inc.: GM Holding Co.; General Motors Corporation; Dollar Rent-A-Car Systems, Inc.; Pentastar Transportation Group, Inc.; Chrysler Corp.

Tiara Enterprises, Inc.: None

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	v
Table of Citations	v
Statement of the Case	1
A. Introduction	1
B. Plaintiff's Allegations	2
C. Denver's Bond Ordinance	3
D. Proceedings In The Courts Below	5
Reasons for Denying the Writ	7
I. The Tenth Circuit Was Correct In Applying The State Action Analysis Adopted By This Court In *Town Of Hallie*.	7
II. The Tenth Circuit Correctly Concluded That The Statutory Authority Behind The Denver Bond Ordinance Satisfied The Clear Articulation Prong.	13
III. The Petition Should Be Denied Because The *Noerr-Pennington* Doctrine Bars Petitioner's Claims.	16

Contents

		Page
A.	Respondents' Alleged Conduct Was Protected Under *Noerr-Pennington*.	16
B.	Respondents' Alleged Conduct Did Not And Cannot Cause Petitioner's Alleged Injury.	18
Conclusion		19

TABLE OF CITATIONS

Cases Cited:

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) 18

Associated Gen. Contractors of Calif., Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) .. 3

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97 (1980) 7, 8

City of Columbia v. Omni Outdoor Adv., Inc., 499 U.S. 365 (1991) 2, 9, 10, 11, 12, 13, 14

Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) ..... i, 1, 5, 7, 16, 17, 18, 19

Federal Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621 (1987) 9, 10

Hoover v. Ronwin, 466 U.S. 558 (1984) 11

Contents

	Page
J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557 (1981)	19
Parker v. Brown, 317 U.S. 341 (1943)	5
Patrick v. Burget, 486 U.S. 94 (1988)	9
Southern Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48 (1985)	9
324 Liquor Corp. v. Duffy, 479 U.S. 335 (1986)	8
Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985)	2, 5, 7, 9, 10, 14
United Mine Workers of Am. v. Pennington, 381 U.S. 657 (1965)	i, 1, 5, 7, 16, 17, 18, 19
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)	19
Statutes Cited:	
C.R.S. § 29-3-101 *et seq.*	14
C.R.S. § 41-4-101 *et seq.*	15
C.R.S. § 41-4-102 *et seq.*	14
C.R.S. § 41-4-106	14, 15
15 U.S.C. § 1 (1995)	1

Contents

Page

Rules Cited:

Fed. R. Civ. Proc. 12(b)(6) 5

Supreme Court Rule 10 1

STATEMENT OF THE CASE

A. Introduction

The petition for writ of certiorari should be denied. The Tenth Circuit's decision neither creates an inter-circuit conflict nor decides a novel issue of law. Petitioner thus raises no basis warranting the grant of certiorari review of the decision. Petitioner's sole argument is that the Tenth Circuit misapplied this Court's case law. This is rarely a basis for granting certiorari (*see* Supreme Court Rule 10) and, even if it were, petitioner fails to present an issue for this Court's consideration because the Tenth Circuit's decision falls squarely within this Court's numerous state action and *Noerr-Pennington* decisions.

Petitioner's two complaints challenged a requirement that he pay a $2.98 Usage Fee for each day that he rented a car at Stapleton International Airport (now Denver International Airport ("DIA")) in Denver, Colorado. Petitioner contends that the Usage Fee is the result of an agreement to fix prices among the respondent car rental companies in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1995). The collection of the Usage Fee by respondents is in fact mandated by a Denver municipal ordinance.

Under Municipal Ordinance No. 863 (the "Bond Ordinance")[1], Denver issued municipal bonds ("Airport Bonds") to finance the construction of car rental facilities at DIA, which Denver owns and leases to each car rental company. The Bond Ordinance compels each car rental company operating at DIA to collect from its customers a $2.98 per day Usage Fee and deliver these fees to the City's collection agent for repayment of the Airport Bonds.

---

1. Both the District Court and the Court of Appeals took judicial notice of the Bond Ordinance and petitioner does not object to these actions.

The Tenth Circuit correctly held that the establishment and collection of the Usage Fee was immune from antitrust liability under the state action doctrine because it was mandated by the Bond Ordinance: Denver was authorized under a series of Colorado statutes to enact a financing ordinance that required the respondents to collect a Usage Fee from their customers and it was a foreseeable consequence of that authority to mandate the collection of fees that competition could be affected. *See City of Columbia v. Omni Outdoor Adv., Inc.*, 499 U.S. 365 (1991). Moreover, the "active state supervision" prong of the state action test did not apply because the Usage Fee was explicitly established and set at $2.98 by Denver in its Bond Ordinance, leaving no private conduct to supervise. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

The Tenth Circuit's ruling simply reflects the application of well established case law to a set of unremarkable facts. The Bond Ordinance and its Usage Fee are no different from dozens of municipal ordinances such as city sales and use tax laws that compel private parties to collect revenues for municipal purposes. In each such instance a municipality compels and in a sense regulates private persons, but in none does it authorize those persons to engage in private anticompetitive conduct that requires supervision. Thus, petitioner's request for review by this Court should be denied because the court below correctly applied established law.

B. Plaintiff's Allegations

Petitioner's two complaints, read in conjunction with Denver's Bond Ordinance, allege facts very different from the inaccurate picture presented by his petition for certiorari. The District Court and the Court of Appeals correctly relied on the facts *as alleged* and as presented on the face of the Bond Ordinance. Respondents submit that the statement of facts in

the Tenth Circuit's opinion is correct, and that extraneous allegations in the petition should be ignored. *See Associated Gen. Contractors of Calif., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983) (on certiorari review of order granting a motion to dismiss antitrust claims, "it is not . . . proper to assume" that petitioner "can prove facts that [he] has not alleged.").

In his complaints, petitioner alleges that the respondent car rental companies: (1) agreed among themselves to impose a uniform additional charge of $2.98 per day on their customers, (2) entered into this agreement "without the participation or knowledge of the City of Denver", and (3) petitioned the City of Denver for the passage of the Bond Ordinance requiring the collection of the Usage Fee, which Bond Ordinance was ultimately passed. Petitioner did not allege that any car rental company charged the Usage Fee prior to the effective date of the Bond Ordinance. Accordingly, petitioner's payment of the Usage Fee was pursuant to the Bond Ordinance.

C. Denver's Bond Ordinance

The Bond Ordinance authorized Denver to construct a series of car rental facilities on city-owned land at DIA and issue $65,579,000 in Airport Bonds. To repay the Bonds, the Bond Ordinance required each rental company tenant to enter a Special Facilities and Ground Lease with the City of Denver pursuant to which:

> *a Usage Fee shall be charged and collected by each Company* from the person entering into each motor vehicle rental agreement with the Company . . . . *The amount of the Usage Fee* for the period from the date of issuance of the [Airport] Bonds to October

> 1, 1994 *shall be $2.98* per transaction day and shall be the same in each Special Facilities Lease.

Bond Ordinance § 3.4(a) (emphasis added).

The Usage Fee is pledged by the City as security for the Airport Bonds. Bond Ordinance ¶ 8. To effectuate that pledge, the Bond Ordinance provides that the car rental companies must deposit the Usage Fee in a Special Facilities Revenue Fund maintained with the City's paying agent. Bond Ordinance § 3.4(a). The Paying Agent is required to use these monies to pay the interest and principal due on the Airport Bonds. Bond Ordinance § 3.1(b).

The Bond Ordinance specifically set the Usage Fee at $2.98 per transaction day. Bond Ordinance § 3.4(a). The Bond Ordinance appoints David M. Griffith and Associates as Denver's "Independent Consultant" charged with making any needed adjustment of the Usage Fee for future years.[2] Any replacement of the Independent Consultant is subject to the review and approval of the City. Bond Ordinance § 1.3. If the usage fee were to be changed — and it never has — the Independent Consultant would be required to calculate the fee using a prescribed formula set out in the Bond Ordinance. Bond Ordinance § 3.4(b). Although the car rental companies may comment on the determination of the Usage Fee, they have no control over it. Bond Ordinance § 3.4(c).

---

2. The Usage Fee has remained at $2.98 since its inception and petitioner does not allege otherwise. Therefore, the only conduct at issue is the charging of the fee initially set by the Ordinance.

D. Proceedings In The Courts Below

Respondents filed motions to dismiss under Fed. R. Civ. P. 12(b)(6), arguing that the required collection of the Usage Fee was exempt from the federal antitrust laws under the state action doctrine recognized in *Parker v. Brown*, 317 U.S. 341 (1943), and that respondents' conduct was protected by the *Noerr-Pennington* doctrine. The District Court granted respondents' motions to dismiss. Pet. App. A, p. 38a.

The Tenth Circuit affirmed the District Court's ruling. Applying this Court's decision in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Tenth Circuit first concluded that Denver's Bond Ordinance satisfied the clear articulation prong of the state action test:

> [I]t is clear the City and County of Denver had authority, pursuant to C.R.S. § 41-4-106, to require defendants to impose the daily usage fee on their car rental customers. As we noted in *Allright* [*Colorado, Inc. v. City and County of Denver*, 937 F.2d 1502 (10th Cir.), *cert. denied*, 502 U.S. 983 (1991)], 41-4-106 gives . . . Denver authority "to regulate the receipt, deposit, and removal and the embarkation of passengers . . . to or from" both Stapleton and DIA, "to exact and require charges, fees, and tolls," . . . . [T]his is precisely what the City and County of Denver did when it enacted the daily usage fee. Further, as in *Allright*, it is reasonably foreseeable that implementation of such authority could displace competition in the area of car rental services.

Pet. App. A, pp. 17a-18a.

Next, the Tenth Circuit concluded that the active state supervision prong of the test need not be applied because the City of Denver set the Usage Fee when it passed the Bond Ordinance, and respondents had no control over it:

> We agree with defendants that state action immunity in this case is properly determined according to the *Town of Hallie* test. In *Patrick* [*v. Burget*, 486 U.S. 94 (1988)], the Supreme Court noted the active supervision prong of the *Midcal* test "requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." 486 U.S. at 101. Such active state review is clearly necessary where private defendants are empowered with some type of discretionary authority in connection with the anticompetitive acts (e.g., to determine price or rate structures). *Here, however, the named defendants have no such discretionary authority. Rather, the provisions of Ordinance 863 make clear that the City and County of Denver is the "effective decision maker" with respect to both the amount of the daily usage fee and imposition of the fee.* [citation omitted] . . . In our view, application of the active supervision prong is of little value under these circumstances because the challenged conduct is mandated and strictly controlled by the City and County of Denver via Ordinance 863.

Pet. App. A, pp. 9a-10a (emphasis added). Thus, the Tenth

Circuit concluded that because the amount of the Usage Fee was set by the City of Denver and not by respondents, there is no private anticompetitive conduct to supervise. The Tenth Circuit also ruled that respondents' conduct was protected by the *Noerr-Pennington* doctrine. Pet. App. A, pp. 18a-19a.

REASONS FOR DENYING THE WRIT

I.

THE TENTH CIRCUIT WAS CORRECT IN APPLYING THE STATE ACTION ANALYSIS ADOPTED BY THIS COURT IN *TOWN OF HALLIE*.

Petitioner's principal argument is that the Tenth Circuit should not have afforded respondents state action immunity because the Bond Ordinance "involved" or "regulated" private parties and, therefore, both the "clear articulation" and the "active supervision" prong of the state action test were required. This Court, however, has never adopted such a vague and inherently unworkable standard. Instead, the Court's state action decisions have established a clear demarcation between situations in which active supervision is required and those where it is not.

Since adopting the two-part state action test, this Court has been careful to distinguish between anticompetitive restraints resulting from the activities of private parties and those imposed by the sovereign itself through legislation. In the former situation, the Court has consistently imposed a two-part requirement for conferring state action immunity: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised by the state itself.' " *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105

(1980). In the latter situation, however, the Court has with equal consistency held that active supervision was not required for the simple reason that the statute did not authorize *private parties* to engage in any anticompetitive conduct needing supervision.

For example, in *Midcal*, the Court reviewed a California statute authorizing *private wine growers* to set the prices at which wine could be resold by retailers. *Id.*, 445 U.S. at 99. As the statute in question expressly authorized private parties to engage in anticompetitive conduct, the Court applied the two-part test and required active supervision of the private price setting activity. At the same time, however, the Court was careful to distinguish the facts in *Midcal* from a situation where the challenged restraint is imposed by the sovereign itself through its own legislation:

> The State simply authorizes price setting and enforces the prices established by private parties. *The State neither establishes prices* nor reviews the reasonableness of the price schedules . . . .

Id. at 105 (emphasis added). *See also 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n.6, 345 (1986) (striking similar legislation on the ground that it "neither establishes prices nor reviews [their] reasonableness" but indicating that "[a] simple 'minimum markup' statute requiring retailers to charge 112 percent of their actual wholesale cost" may satisfy the "active supervision" requirement). The Court in *Midcal* and *324 Liquor Corp.* offered the sovereign a choice: to obtain state action immunity, the sovereign could either establish prices itself in its legislation or it could authorize private parties to set prices. In this latter case, however, the sovereign could authorize the setting of prices only on the condition that it actively supervised the authorized private anticompetitive conduct.

This Court has consistently distinguished between the sovereign establishing the restraint itself and the sovereign authorizing private parties to do so in every case relied upon by petitioner. Each case makes it clear that active supervision is required only when the sovereign authorizes or compels private parties to engage in conduct that would otherwise be an antitrust violation. *See Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 57 (1985) ("the State must supervise actively any *private anticompetitive conduct.*"); *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (the active supervision prong "requires that state officials have and exercise power to review *particular anticompetitive acts of private parties* and disapprove those that fail to accord with state policy."); *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992) ("A state law . . . cannot be the basis for antitrust immunity unless . . . the State provides active supervision of anticompetitive conduct *undertaken by private actors.*") (all emphasis added).

In contrast to cases such as *Southern Motor Carriers*, *Patrick* and *Ticor* in which the sovereign delegated to private parties the authority to adopt anticompetitive restraints, are the Court's decisions in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) and *City of Columbia v. Omni Outdoor Adv., Inc.*, 499 U.S. 365 (1991) in which the challenged restraints were imposed by *local governments*, acting pursuant to state policy. In both cases the Court found it unnecessary to require active supervision of private conduct because it was clearly the sovereign that was the effective decision maker.

In *Town of Hallie*, several Wisconsin towns sued the City of Eau Claire alleging that the city had illegally extended its monopoly over sewage treatment services. The Court, after finding that the City of Eau Claire's conduct was clearly authorized under Wisconsin law (thus satisfying the clear articulation prong of the two-part test), concluded that the

conduct of municipalities need not be actively supervised to benefit from state action immunity. *Town of Hallie,* 471 U.S. at 46. This conclusion, that the conduct of municipalities of enacting anticompetitive legislation need not be actively supervised, simply accorded to municipalities that which was already true of states: when the sovereign itself (the state, or a local government acting pursuant to the state's policy) enacts a restraint on trade, it need not comply with the active supervision requirement. *Id.*

The Court confirmed this rule in *City of Columbia* where the City of Columbia had passed a zoning ordinance restricting the size and location of billboards and allegedly restrained trade in that market. As in *Town of Hallie*, the Court only found it necessary to apply the clear articulation prong of the state action test. *City of Columbia*, 499 U.S. at 370-75. Significantly, as is the case here, the plaintiff had contended that the City of Columbia enacted the zoning ordinance in response to the request of a private party. Indeed, the jury in that case had concluded that the ordinance was "enacted pursuant to an agreement between city officials and a private party to restrict competition." *Id.* at 393 (Stevens, J., dissenting). Nevertheless, in spite of the fact that a private party was "involved" in actually instigating the enactment of the ordinance and that the ordinance "regulated" private conduct, this Court did not require active supervision because the challenged restraint was clearly imposed by the City of Columbia through its passage of the zoning ordinance, leaving no private conduct to supervise.

Petitioner confuses these distinct lines of cases when he contends that the Tenth Circuit should have gone behind the Bond Ordinance to determine whether Denver's legislative body adequately reviewed the reasonableness of the Usage Fee prior to enacting it as law. *See, e.g.*, Petition, p. 3. Unlike cases such as *Ticor* where private parties set the prices at issue which

automatically became law unless a state agency intervened, here as in *City of Columbia*, the challenged restraint is solely the result of Denver's decision to enact the Bond Ordinance. By asking the Court to second guess the decision of the Denver City Council in passing the Bond Ordinance, petitioner asks the Court to engage in:

> the sort of deconstruction of the governmental process and probing of the official "intent" that we have consistently sought to avoid. "[W]here the action complained of . . . was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action."
>
> . . .
>
> For these reasons, we reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns. . . .

City of Columbia, 499 U.S. at 377-379 (quoting *Hoover v. Ronwin*, 466 U.S. 558, 579-580 (1984)).

At bottom, petitioner here questions the wisdom of the Denver Bond Ordinance and the role of respondents in its enactment. Similarly, in *City of Columbia*, the Court was invited to go behind the city's zoning ordinance to determine whether the City had acted properly in passing that law. As it did in *City of Columbia*, the Court should reject "any interpretation of the Sherman Act that would allow plaintiffs to look behind" Denver's actions. *Id.*

Finally, petitioner's proposed rule requiring active supervision any time private parties are "involved" or are "regulated," as opposed to the current rule under which active supervision is required only where the sovereign authorizes private parties to engage in anticompetitive conduct, is unworkable and nonsensical. Virtually every law involves or regulates private parties in one way or another. For example, under Denver's zoning laws, competitors are limited as to the locations of their businesses or products (newcomers may even be prevented from locating in the relevant market). Under Denver's sales tax laws, competitors are compelled to collect from their customers a uniform surcharge, exactly as the respondents are required to do with the Usage Fee. Under Colorado's liquor laws, stores are barred from competing on Sundays and numerous competitors such as supermarkets are barred altogether. No one would reasonably argue that simply because private parties were "involved" in or are "regulated" by these statutes compliance with these laws will subject them to antitrust liability unless their conduct is actively supervised! Yet this is exactly what petitioner contends in his brief.

The flaw in petitioners' argument is that while all of these laws regulate private parties and, as in *City of Columbia*, private parties may well have been "involved" in their passage by petitioning for them, none of these laws authorizes *private parties* to engage in conduct that violates the antitrust laws. Similarly, respondents' compliance with the Bond Ordinance need not be actively supervised since, like these examples, the Bond Ordinance does not authorize respondents to engage in any illegal anticompetitive conduct such as price fixing.

II.

THE TENTH CIRCUIT CORRECTLY CONCLUDED THAT THE STATUTORY AUTHORITY BEHIND THE DENVER BOND ORDINANCE SATISFIED THE CLEAR ARTICULATION PRONG.

Petitioner's contention that the Tenth Circuit erroneously applied the clear articulation prong of the state action immunity test to the Bond Ordinance is premised entirely on an incorrect characterization of the Court's clear articulation standard. Specifically, petitioner's contention that respondents must show that the state of Colorado explicitly "contemplated" that cities would control the prices charged by car rental companies, Petition, p. 15, was rejected by this Court in *City of Columbia*:

> The dissent contends that, in order successfully to delegate its Parker immunity to a municipality, a State must expressly authorize the municipality to engage (1) in specifically "economic regulation," . . . (2) of a specific industry . . . . These dual specificities are without support in our precedents, for the good reason that they defy rational implementation.
>
> . . .
>
> If, by authority to engage in specifically "economic" regulation, the dissent means authority specifically to regulate competition, we squarely rejected that in *Hallie v. Eau Claire* . . . .

City of Columbia, 499 U.S. at 373 n.4.

In contrast to petitioner, the Tenth Circuit relied on this Court's decisions in *Town of Hallie* and *City of Columbia* where the Court ruled that clear articulation is demonstrated when "suppression of competition is the 'foreseeable result' of what the statute authorizes." *City of Columbia*, 499 U.S. at 373. In applying this standard, the Tenth Circuit reviewed numerous statutes, including the Colorado County and Municipality Development Revenue Bond Act, C.R.S. § 29-3-101 *et seq.* and C.R.S. § 41-4-102 *et seq.* These statutes authorize municipalities and counties (Denver is both a city and a county) to erect airports, issue bonds and enter into arrangements for the repayment of those bonds. The Tenth Circuit particularly relied on C.R.S. § 41-4-106 which provides that counties have the power, in connection with the erection, maintenance, and operation of any airport:

> to regulate the receipt, deposit, and removal and the embarkation of passengers or property to or from such airports; *to exact and require charges, fees, and tolls* . . . to lease or assign for operation such space or area . . . necessary or useful in connection therewith; . . . to provide rules and regulations governing the use of such airport and facilities and the use of other property and means of transportation within or over said airport . . . .

C.R.S. § 41-4-106 (emphasis added). Based on these statutes, the Tenth Circuit correctly concluded that the collection of the Usage Fee was a "foreseeable result" of what the statutes authorized. Pet. App. A, pp. 12a-18a.

Petitioner attempts to avoid this case law by contending that the Bond Ordinance sets prices for car rentals, and that,

therefore, the relevant state statutes must expressly authorize such price setting. Petition, pp. 15-16. The response to this contention is simple: The Bond Ordinance does not set vendor prices. All that the Bond Ordinance requires of the car rental companies is that they collect from each customer a $2.98 Usage Fee and pay it over to the City's collection agent. The Ordinance says nothing about the prices the rental car companies must charge their customers. The rental car companies remain free to charge whatever price they choose. The Usage Fee is no different from Denver's uniform city sales tax that the rental car companies also must charge their customers. As with the Usage Fee, Denver's requirement of a sales tax is in no way a control of prices; it is a "fee or toll" collected on behalf of the City.

Petitioner next argues that C.R.S. § 41-4-106 only authorizes collection of "fees and tolls" by Denver itself and not by private companies such as respondents. This contention finds no support in the statutes. Nothing in Colorado's statutes even remotely suggests that Denver cannot mandate that private parties collect tolls and fees on its behalf. To the contrary, that is exactly what Denver is doing and has done for decades when it mandates the collection of the city sales tax by private companies from their customers. Petitioner's strained argument would render any toll, fee or tax arrangement imposed by a city or state a violation of the antitrust laws.

Perhaps realizing the futility of arguing that the relevant statutes did not authorize Denver to charge a Usage Fee, petitioner next complains that the Bonds are not tax exempt and therefore not authorized under the cited statutes. This argument was not raised below and, in any event, is wrong. C.R.S. § 41-4-101 *et seq.*, which authorizes the City to issue bonds, does not require bonds to be exempt from tax, but expressly authorizes the City "*to exact and require charges, fees, and tolls.*" C.R.S. § 41-4-106 (emphasis added).

III.

THE PETITION SHOULD BE DENIED BECAUSE THE *NOERR-PENNINGTON* DOCTRINE BARS PETITIONER'S CLAIMS.

Petitioner's emphatic objection that "[t]he *Noerr-Pennington* doctrine has nothing to do with this case". Petition, p. 20, constitutes the fundamental and pervasive flaw in petitioner's case: *every* aspect of the respondents' alleged conduct is protected by the *Noerr-Pennington* doctrine.

A. Respondents' Alleged Conduct Was Protected Under *Noerr-Pennington.*

The sole basis of petitioner's antitrust claim is the allegation that respondents met and agreed to the Usage Fee and then petitioned the City of Denver to pass an ordinance requiring it. Assuming the truth of this allegation, this is precisely the sequence of events that is addressed by the *Noerr-Pennington* doctrine: concerted efforts by competitors to achieve anticompetitive ends through the actions of government.

Petitioner appears to argue that the alleged agreement to charge a uniform Usage Fee can be isolated from the admittedly exempt concerted lobbying conduct and resulting Bond Ordinance. Petition, p. 20. Such a distinction finds no support in common sense or in this Court's *Noerr-Pennington* decisions. It is impossible for two persons to engage in concerted lobbying to obtain desired government action without first coming to an agreement to do so. Petitioner's suggestion that the *Noerr-Pennington* doctrine protects only the concerted lobbying effort but not the prior agreement to engage in such lobbying would render the doctrine senseless and hollow.

Of course, the *Noerr-Pennington* doctrine exempts not merely lobbying conduct but also agreements among private parties to restrain trade when the anticompetitive restraint complained of results from government action. As this Court stated in *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961):

> [W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out . . . .
>
> We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

Id. at 136.

This principle was followed in *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965), where a miners' union and a number of large mining companies agreed among themselves to petition the Secretary of Labor for a minimum wage so high that small companies would be unable to compete. Their subsequent joint petitioning effort was successful. This Court found that such concerted activity, *regardless of its anticompetitive purpose*, was protected, under *Noerr*, from antitrust scrutiny. *Id.* at 670.

In reaching this conclusion in *Pennington*, this Court did not distinguish between the prior agreement of the parties to set a minimum wage and the subsequent act of petitioning jointly

for legislation to achieve that goal. Instead, this Court held that all of the activities were protected. *Id.* Thus, petitioner attempts to dissect the "prior agreement" from the subsequent petitioning conduct in a way that this Court never intended.

B. Respondents' Alleged Conduct Did Not And Cannot Cause Petitioner's Alleged Injury.

Finally, petitioner's efforts to distinguish respondents' alleged agreement to charge a Usage Fee from the resulting lobbying for and enactment of the Bond Ordinance fail for a different reason: petitioner has not and cannot allege any harm resulting from this alleged agreement. The only harm alleged in either complaint is the requirement to pay the $2.98 Usage Fee. However, because the Usage Fee *is required by Denver's Bond Ordinance* and petitioner is required under the Ordinance to pay the Usage Fee regardless of the existence of any alleged conspiracy among respondents, petitioner has failed to allege how such a conspiracy caused him or anyone else any injury.

Since the alleged agreement to fix prices is not the source of his harm, petitioner has no basis to assert an antitrust claim:

> "[W]here a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action," those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint.

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499 (1988) (quoting *Noerr*). In reaching this conclusion in *Allied Tube*, the Court simply reaffirmed the very basic principle of antitrust law that a private plaintiff can only recover damages *proximately caused* by the alleged anticompetitive conduct. *See*

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969) (to prevail on an antitrust claim, plaintiff must prove "some damage flowing from the unlawful conspiracy."); *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981) ("plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent."). Thus, even assuming that respondents' alleged conduct of entering into an agreement to fix prices was not protected petitioning conduct, petitioner's claim is nevertheless barred by *Noerr* and its progeny because the cause of his injury is the Denver Bond Ordinance, not the alleged agreement.

CONCLUSION

The Tenth Circuit's decision falls squarely within the Court's numerous state action and *Noerr-Pennington* decisions. Moreover, the lower court's decision does not represent a split among the federal circuits. There is nothing in this case that even suggests the existence of a novel issue or a departure from this Court's substantial body of state action precedent. Accordingly, respondents respectfully submit that the petition for certiorari be denied.

Respectfully submitted,

TERENCE C. GILL
Counsel of Record
STEPHEN D. GURR
BROWNSTEIN HYATT FARBER
& STRICKLAND, P.C.
Attorneys for Respondent
Hertz Corporation
410 Seventeenth Street
22nd Floor
Denver, CO 80202
(303) 534-6335